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ABDUL AZIZ JAMAL v. PP

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: J-05-64-03-2015]
4 MAY 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence and conviction – Trafficking in dangerous drugs – Drugs found in bag carried by accused – Whether*
C *prosecution had made out case of presumed possession and direct trafficking – Whether trial judge erred in invoking double presumption of possession and trafficking – Whether conviction and sentence safe – Dangerous Drugs Act 1952, s. 39B(1)(a)*

D A drug operation exercise was carried out by a team of police officers at a bus terminal. The appellant was seen alighting from a bus and proceeding to the bus luggage compartment where he picked a bag and hurriedly walked towards the rear of the bus. The police approached the appellant and upon introducing themselves, the appellant dropped the bag and started to run but was successfully apprehended. An examination of the bag revealed 14 slabs
E of compressed plant material which were later confirmed by the chemist to be 13,517g of cannabis. The appellant was charged at the High Court for the offence under (i) s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking 13,517g of cannabis; (ii) s. 12(2) of the DDA for the possession of 0.23g of heroin; and (iii) s. 12(2) of the DDA for the possession of 0.19g
F of heroin. At the conclusion of the trial, the trial judge found the defence of the appellant to be a mere denial. The appellant was (i) convicted for the charge of trafficking drugs and sentenced to death; and (ii) convicted for the two charges of possession of drugs and sentenced to six months imprisonment. Aggrieved by the conviction and sentence for the trafficking
G charge, the appellant filed the present appeal and submitted that the trial judge erred in, *inter alia*, invoking double presumption of possession and trafficking.

Held (allowing appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

H **(1)** It is incumbent on a trial judge to make a finding whether the prosecution had made out a case of presumed possession under s. 37(d) of the DDA and direct trafficking under s. 2 of the same Act; or a case of *mens rea* possession and presumed trafficking under s. 37(da) of the DDA. It could not be said for certain what was the finding of the trial
I judge in convicting the appellant. The trial judge seriously misdirected himself on several aspects, namely when His Lordship (i) stated that the

finding was made independent of the statutory presumption on one hand, yet on the other hand, His Lordship invoked the statutory presumption; (ii) invoked not the presumption of either possession or trafficking but both presumptions of possession and trafficking; and (iii) failed to rule at the end of the defence case whether the appellant had rebutted the presumptions. While there was a finding that the appellant had failed to rebut the presumption of trafficking, there was no mention of whether the appellant had rebutted or otherwise the presumption of possession under s. 37(d) of the DDA. (paras 19, 20 & 27)

(2) The various misdirection and the infirmities in the grounds of judgment of the trial judge had rendered the conviction of the appellant unsafe. The conviction and sentence of the High Court was set aside and the appellant was acquitted and discharged. (para 28)

Bahasa Malaysia *Headnotes*

Satu operasi dadah telah dijalankan oleh satu pasukan pegawai polis di terminal bas. Perayu dilihat turun dari bas dan terus ke bahagian bagasi bas di mana dia mengambil sebuah beg dan berjalan dengan tergesa-gesa ke arah belakang bas. Pihak polis mendekati perayu dan apabila memperkenalkan diri mereka, perayu melepaskan beg dan cuba melarikan diri tetapi berjaya diberkas. Pemeriksaan beg menemui 14 ketulan mampat bahan tumbuhan yang kemudian disahkan oleh ahli kimia sebagai 13,517g kanabis. Perayu dituduh di Mahkamah Tinggi bagi kesalahan di bawah (i) s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 13,517g kanabis; (ii) s. 12(2) ADB kerana memiliki 0.23g heroin; dan (iii) s. 12(2) ADB kerana memiliki 0.19g heroin. Semasa penutup perbicaraan, hakim bicara memutuskan bahawa pembelaan perayu adalah satu penafian semata-mata. Perayu (i) disabitkan atas pertuduhan mengedar dadah dan dijatuhkan hukuman mati; dan (ii) disabitkan atas dua pertuduhan memiliki dadah dan dijatuhkan hukuman penjara enam bulan. Terkilan dengan sabitan dan hukuman bagi pertuduhan mengedar, perayu memfailkan rayuan ini dan menghujahkan bahawa hakim bicara terkhilaf dalam, antara lain, membangkitkan anggapan berganda milikan dan pengedaran.

Diputuskan (membenarkan rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara wajib memutuskan sama ada pihak pendakwaan telah membuktikan satu kes anggapan milikan di bawah s. 37(d) ADB dan pengedaran langsung di bawah s. 2 Akta yang sama; atau satu kes milikan *mens rea* dan anggapan pengedaran di bawah s. 37(da) ADB. Tidak diketahui apa sebenarnya dapatan hakim bicara dalam mensabitkan perayu. Hakim bicara tersalah arah secara serius dalam beberapa aspek, khususnya apabila beliau (i) menyatakan bahawa dapatan dibuat bebas daripada anggapan statutori dalam satu sudut tetapi

dalam satu sudut lain, beliau membangkitkan anggapan statutori; (ii) membangkitkan bukan salah satu anggapan milikan atau pengedaran tetapi kedua-dua anggapan milikan dan pengedaran; dan (iii) gagal memutuskan di akhir kes pembelaan sama ada perayu telah menyangkal semua anggapan. Walaupun ada dapatan bahawa perayu gagal menyangkal anggapan pengedaran, tidak dinyatakan sama ada perayu berjaya menyangkal anggapan milikan di bawah s. 37(d) ADB atau tidak.

(2) Salah arah dan kelemahan pelbagai yang terkandung dalam alasan penghakiman hakim bicara menyebabkan sabitan perayu tidak selamat. Sabitan dan hukuman oleh Mahkamah Tinggi diketepikan dan perayu dibebaskan dan dilepaskan.

Case(s) referred to:
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ooi Hock Kheng v. PP [2014] 1 LNS 685 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
Seyedalireza Seyedhedayatollah Etheshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***
Ugonna Philip Nwankwo v. PP [2016] 2 CLJ 247 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), First Schedule

For the appellant - Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs
For the respondent - Wan Shaharuddin Wan Ladin; DPP

[Editor's note: For the High Court judgment, please see PP v. Abdul Aziz Jamal [2015] 1 LNS 1182 (overruled).]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Background

[1] The appellant was convicted and sentenced to death by the High Court for an offence of trafficking in dangerous drugs and was convicted and sentenced to six months imprisonment respectively on two charges of possession of dangerous drugs. The imprisonment was ordered to run concurrently from the date of arrest. The charges (exh. P1) read:

First Amended Charge

Bahawa kamu pada 09/05/2013 jam lebih kurang 7.45 malam di Stesen Bas Larkin, Kompleks Pengangkutan Awam Larkin, dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya jenis Cannabis berat bersih 13.517 kilogram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Second Amended Charge

Bahawa kau pada 09/05/2013 jam lebih kurang 7.45 malam, di Stesen Bas Larkin, Kompleks Pengangkutan Awam Larkin, dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah didapati dalam milik kamu dadah berbahaya jenis Heroin seberat bersih 0.23 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

Additional Charge

Bahawa kamu pada 09/05/2013 jam lebih kurang 7.45 malam di Stesen Bas Larkin, Kompleks Pengangkutan Awam Larkin, dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah didapati dalam milik kamu dadah berbahaya jenis Monoacetylmorphines seberat bersih 0.19 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

[2] Aggrieved by the conviction and sentence for the trafficking charge, the appellant appealed to this court. We heard the appeal and had unanimously allowed the same. We now provide our reasons.

The Prosecution's Case

[3] On 9 May 2013, a team of police personnel proceeded to the Larkin Bus Terminal, Kompleks Pengangkutan Awam Larkin, Johor Bahru for a drug operation exercise.

[4] At about 7.45pm, an express bus Supernice bearing registration number PJW 6966 arrived at the Larkin Bus Station. ASP Mohd Isa bin Bidin (SP4) instructed his team members to tail the bus until it stopped. SP4 saw the appellant alighting from the bus, proceeded to the bus luggage compartment and was seen picking a black bag with wording 'SQPOLO' (exh. P16). The appellant hurriedly walked towards the rear of the bus.

[5] SP4 and his team members approached the appellant. Showing his authority card, SP4 said 'police'. Upon hearing 'police' the appellant dropped P16 and started to run. After a short chase, the appellant was apprehended by Insp Azrul Izwan (SP6) and one Corp Faizal.

[6] SP4 conducted an examination of the black bag exh. P16. 14 slabs of compressed plant material were found inside P16. Inspector Suhaila binti Taib @ Basar (SP7) sent the 14 slabs to the chemist. Upon analysis by the chemist Abdul Rahim bin Shadan (SP1), the slabs of compressed plant material were confirmed to be cannabis weighing 13,517g. Cannabis is listed as dangerous drugs under the First Schedule of the Dangerous Drugs Act 1952 (the Act).

A **Findings At The End Of The Prosecution's Case**

[7] The learned trial judge accepted the evidence for the prosecution that the appellant was carrying exh. P16 and that the appellant 'took to his heels' as soon as SP4 introduced himself as a police officer. His Lordship made an inference that the appellant had the requisite knowledge of the drugs in P16.

B

[8] Given that there was also evidence that the appellant had possession of the other dangerous drugs which formed the subject matter of the two charges of possession, the learned trial judge made a finding that the appellant's act of running away from the scene spoke volumes of his knowledge of the drugs. From the conduct, the learned trial judge concluded

C that the appellant must have known the nature of the drug in exh. P16 and that the appellant has the ultimate power of disposal of the drugs which he was carrying. The appellant was thus found to have *mens rea* possession of the drugs in exh. P16 without the aid of any statutory presumption provided for in the Act.

D

[9] As for the element of trafficking, the learned trial judge found that there was overwhelming evidence to show that the appellant was carrying and transporting dangerous drugs in large amount. Hence His Lordship made a positive finding of trafficking under s. 2 of the Act.

E **[10]** Having found that the prosecution had made out a *prima facie* case, the appellant was called upon to enter his defence.

The Defence

[11] In his evidence given under oath, the appellant stated that he came to

F Johor Bahru from Butterworth in search of an employment and that he had with him a sling bag which contained his personal belonging, namely clothes, cash, identity cards and hand phones. The sling bag was not produced in court.

[12] The appellant denied that he carried the bag, P16 when he was arrested

G by the police. He also denied that he had picked up P16 when he alighted from the bus.

[13] Several other witnesses were called by the defence, one of whom was the appellant's friend, Dickson Levy a/l Marie (SD5) who had boarded the bus at Seremban Bus Terminal and who was also arrested at the Larkin Bus

H Station. SD5 gave evidence that apart from the sling bag, he did not see the appellant carrying any other bag.

Findings Of The Trial Judge At The End Of The Defence Case

[14] The learned trial judge found that the defence of the appellant was a

I mere denial which has failed to raise a doubt on the prosecution case and has not rebutted the presumption of trafficking. The appellant was thus convicted and sentenced to death, hence the appeal.

The Appeal

[15] Learned counsel for the appellant canvassed the following grounds of appeal:

(i) the learned trial judge erred in invoking double presumption of possession and trafficking;

(ii) the learned trial judge erred in not undertaking a separate test in determining the element of knowledge; and

(iii) the learned trial judge erred in failing to appreciate the defence sufficiently.

[16] In relation to the first ground, it was the submission of learned counsel that the learned trial judge had misdirected himself in arbitrarily invoking both the statutory presumptions when at the same time His Lordship had made a finding that there was direct evidence to prove *mens rea* possession and trafficking. The learned trial judge had also seriously misdirected himself in invoking both the presumptions under s. 37(d) and 37(da) of the Act. On this ground alone, learned counsel submitted that the appellant ought to be acquitted and discharged. Learned counsel relied on two cases decided by this court, namely *Seyedalireza Seyedhedayatollah Ehteshmiardestani v. PP* [2014] 4 CLJ 406 and *Ugonna Philip Nwankwo v. PP* [2016] 2 CLJ 247.

Our Decision

[17] At the outset we wish to state that regardless of what the prosecution's case was based on, it is incumbent on a trial judge to make a finding whether the prosecution had made out a case of presumed possession under s. 37(d) of the Act and direct trafficking under s. 2 of the Act; or a case of *mens rea* possession and direct trafficking under s. 2 or a case of *mens rea* possession and presumed trafficking under s. 37(da).

[18] In the instant appeal, it cannot be said for certain what was the finding of the learned trial judge in convicting the appellant, as it is apparent from the grounds of judgment that His Lordship made two different sets of finding on possession and trafficking at the end of the prosecution's case. To appreciate the complaint of learned counsel, we reproduce below the judgment of the High Court (appeal record vol. 1: pp. 19 & 21):

> From the (*sic*) evaluating the evidence of the prosecution witnesses there were overwhelming direct evidence to show that the accused had the *mens rea* possession of the drugs in the black bag and in his pocket trouser. His act of running away from the scene spoke volumes of his knowledge of the drugs. The accused must have known the nature of the drug in the black bag and has the ultimate power of disposal of the drugs he was carrying. In this case the Court has no hesitation in coming to a view that base of (*sic*) the evidence of the prosecution's witnesses especially SP4 and SP6 respectively, that the accused had the *mens rea* possession of the drugs in the black bag and in his pocket without the aid of any presumption.

A ...

The prosecution in their endeavour to prove the third ingredient of the offence has decided to use the aid of the presumption in Section 37(da) of the Act. However the Court found that an overwhelming evidence to show that the accused was carrying and transporting dangerous drugs in large amount, a positive finding of trafficking under Section 2 of the Act, independent of the presumption of trafficking under Section 37(da) of the Act to prove its case. The Court held in the instant case that aid of presumption under Section 37(da) of the Act may not be resorted to because of the availability of direct evidence that the accused was carrying and transporting by bus the black bag containing the impugned drugs.

[19] There would have been no leg for learned counsel to stand on had the learned judge stopped at that finding. Nevertheless, His Lordship proceeded to state the following and in so doing, had contradicted his earlier finding (appeal record vol. 1: p. 22):

The Court in the instant case and on the available direct evidence and upon a maximum evaluation made a finding of fact that the accused had in his possession an amount of 13,517 grams of cannabis as listed under Section 37(da)(vi), and therefore he was presumed to be trafficking in the said drugs cannabis. ...

...

The Court upon a maximum evaluation of the prosecution evidence was satisfied that the prosecution had successfully proved all the ingredients of the offence and thus had proved a *prima facie* case against the accused and therefore called upon the accused to enter his defence in respect of the offence charged. It was the finding of the Court that the accused had custody and control of the black bag (P16) which contained the impugned drugs hidden and invoking the statutory presumption under Section 37(d) of the Act, that the accused is deemed to have been in possession of the impugned drugs and deemed to have known the nature of the drugs.

[20] From the above quoted passages of the grounds of judgment, we found that the learned trial judge had seriously misdirected himself on several aspects. The first aspect was when His Lordship stated that his finding was made independent of the statutory presumption on one hand, yet on the other hand he invoked the statutory presumption. The second aspect was when the learned trial judge invoked not the presumption of either possession or trafficking but both presumptions of possession and trafficking and the third aspect of the misdirection was when the learned judge failed to rule at the end of the defence case whether the appellant had rebutted the presumptions.

[21] On the first misdirection, we endorsed the judgment of Augustine Paul J (as he then was) in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 wherein His Lordship said at p. 669:

> However if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed. ... I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the evidence available is not safe or satisfactory to be relied upon.

[22] On the second misdirection which occurred when the learned trial judge invoked both the statutory presumptions of possession and trafficking at the end of the prosecution's case, we found that the approach of the learned trial judge was in clear breach of the principle of law enunciated by the Federal Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170.

[23] In *Seyedalireza* (*supra*) this court had considered the issue of misdirection by the learned trial judge in invoking both the presumptions under s. 37(d) and (da) of the Act in the alternative. We had ruled that the approach of the learned trial judge in not electing or making a finding on which presumption was invoked but by merely relying on the alternative, amounted to a misdirection by way of non-direction which had prejudiced the appellant as it impacted on the burden of proof placed on the defence. We consequently set aside the conviction and sentence imposed by the High Court and we acquitted and discharged the appellant. Our decision in *Seyedalireza* (*supra*) has been affirmed by the Federal Court *vide* Mahkamah Persekutuan Rayuan Jenayah 05-53-03-2014(B).

[24] In *Ugonna* (*supra*), likewise we had set aside the conviction and sentence of the High Court and we acquitted and discharged the appellant on similar issue of misdirection by the learned trial judge in handling the presumptions and in failing to make a ruling whether the s. 37(da) presumption had been rebutted.

[25] Faced with similar issue in the instant appeal, we found no compelling reason to depart from our earlier decision in *Seyedalireza* (*supra*) and *Ugonna* (*supra*). We wish to state that in both these cases, the drugs were found in the bag carried by the appellants.

[26] We move on to the third misdirection. Having invoked the presumptions at the end of the prosecution's case, it was incumbent upon the learned trial judge to rule at the conclusion of the trial whether the presumptions had been rebutted by the defence.

[27] While there was a finding that the appellant had failed to rebut the presumption of trafficking, there was no mention in the grounds of judgment whether the appellant had rebutted or otherwise the presumption of possession under s. 37(d) of the Act. Case laws have shown that this omission was a material misdirection, warranting an appellate intervention. Suffice if we quote the judgment of this court in *Ooi Hock Kheng v. PP* [2014] 1 LNS 685 where Azhar Mohamed JCA (as he then was) said:

> There is another reason why we had allowed the appeal. At the conclusion of the case for the prosecution, the learned JC had invoked section 37(d) of the DDA to prove possession of the appellant for the Ketamine in the plastic bag. The statutory presumption of possession under section 37(d) is a rebuttable presumption. For this reason, it is incumbent on the learned JC to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities. A reading of the judgment of the learned JC shows that he had failed to direct his mind on this point. This is a serious misdirection as the law requires the learned JC to make a finding when he resorted to the presumption under section 37(d) of the DDA (see: *Alcontara a/l Ambross Anthony v PP* [1996] 1 CLJ 705, *Tan Boon Kean v. PP* [1995] 4 CLJ 456 and *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113).

[28] Premised on the foregoing, we found merit in the first issue raised by learned counsel for the appellant. We were unanimous in our view that the various misdirection and the infirmities in the grounds of judgment of the learned trial judge had rendered the conviction of the appellant unsafe. In the circumstances, we found no necessity to deal with the other grounds of appeal raised by the appellant. We allowed the appeal and set aside the conviction and sentence of the High Court. The appellant was acquitted and discharged.